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Clark v. State, 363 So. 2d 333 (Fla. 1978)

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Criminal Law—RIGHT TO REMAIN SILENT—OBJECTION AND MOTION FOR MISTRIAL NOW REQUIRED TO PRESERVE AN IMPROPER COMMENT ON THE DEFENDANT'S SILENCE FOR APPELLATE REVIEW—*Clark v. State*, 363 So. 2d 333 (Fla. 1978).

On July 28, 1978, the Florida Supreme Court issued an opinion in response to conflicting district courts of appeal's decisions in *Bostic v. State*[1] and *Clark v. State*.[2] The conflict between *Bostic* and *Clark* presented the supreme court with the issue of "whether a contemporaneous objection is necessary to preserve as a point on appeal an improper comment on a [criminal] defendant's exercise of his right to remain silent."[3]

In *Bostic*, the Fourth District Court of Appeal reviewed the petitioner's conviction for the possession of marijuana. The petitioner sought a reversal of his conviction on the basis that two police officers had testified at trial that the petitioner, after his arrest, exercised his right to remain silent. The state argued for affirmance on the grounds that there was no objection at trial to the offending testimony, and that the error, if any, was harmless.[4] The court ruled that the admission of the offending testimony was a fundamental error per se which did not "require a trial objection to preserve the issue on appeal."[5] Consequently, the petitioner's conviction was reversed and the cause was remanded for a new trial.[6]

In *Clark*, the Second District Court of Appeal reviewed the petitioner's conviction for breaking and entering with the intent to commit grand larceny. At trial, one of the arresting police officers had testified that the petitioner, after being informed of his right to

1. 332 So. 2d 349 (Fla. 4th Dist. Ct. App. 1976), *rev'd sub nom.* Clark v. State, 363 So. 2d 331 (Fla. 1978).

2. 336 So. 2d 468 (Fla. 2d Dist. Ct. App. 1976), *aff'd*, 363 So. 2d 331 (Fla. 1978).

3. 363 So. 2d at 332. For a concise historical overview of the right to remain silent, see Judge Wisdom's opinion for the court in DeLuna v. United States, 308 F.2d 140, 144-51 (5th Cir. 1962).

4. 332 So. 2d at 350.

5. *Id.* A fundamental error is that "which goes to the foundation of the case or . . . the merits of the cause of action." Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970). Fundamental errors are considered by appellate courts despite the lack of an objection at trial; however, such consideration should be exercised on a limited basis. *See* Ashford v. State, 274 So. 2d 517, 518 (Fla. 1973); Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970); FLA. STAT. § 90.104(3) (1977).

In contrast to fundamental error, reversible error is qualitatively less egregious. Reversible error is that which detrimentally affects the substantial rights of the offended party. *See* City of Jacksonville v. Glover, 69 So. 20, 22 (Fla. 1915); FLA. STAT. § 924.33 (1977). Generally, appellate courts will not review allegations of reversible error unless a timely objection was made at trial, and the trial court ruled adversely to the objection. *See* State v. Barber, 301 So. 2d 7, 9 (Fla. 1974).

6. 332 So. 2d at 350.

remain silent, proceeded to assert that right. Defense counsel did not object to the officer's testimony.[7]

The court in *Clark* refused to rule that the admission of the officer's testimony was a fundamental error per se which did not require a trial objection to preserve the point on appeal. However, the court also declined to rule that an objection was always necessary to preserve an improper comment on a defendant's silence for appellate consideration. The court recognized that because some references to a defendant's silence could be fundamental error, allegations of such error should be considered on an ad hoc basis. The court in *Clark* determined that the trial record did not support an allegation of fundamental error and affirmed the petitioner's conviction.[8]

Based on the conflict between the Fourth District Court of Appeal in *Bostic* and the Second District Court of Appeal in *Clark*, the Florida Supreme Court exercised jurisdiction to review the two decisions.[9] The court quashed the decision in *Bostic* and affirmed the judgment in *Clark*.[10] However, the supreme court failed to adopt the reasoning in *Clark*, and held instead that in the event of an improper comment on a defendant's exercise of the right to remain silent, both a contemporaneous objection to that comment *and* a motion for a mistrial are prerequisites for appellate review of the error.[11]

To fully appreciate the significance of the Florida Supreme Court's decision in *Clark*, it is necessary to review the history of Florida's judicial interpretation of infringements upon a criminal defendant's right to remain silent. This review will focus primarily on Florida Supreme Court opinions which have dealt with the question of whether an improper comment on a defendant's exercise of that right is an error of fundamental dimensions.

In 1892, the Florida Legislature granted criminal defendants the right to make a sworn statement to the jury in furtherance of their defense.[12] In 1895, this statutory right was amended in part to prohibit any prosecuting attorney from commenting upon the failure of the accused to testify in his own behalf.[13] One of the first Florida

7. 336 So. 2d at 469.

8. *Id.* at 473.

9. 363 So. 2d at 332. The FLA. CONST. art. V, § 3 (b) (3) provides: "The supreme court . . . [m]ay review by certiorari any decision of a district court of appeal . . . that is in direct conflict with a decision of any district court of appeal . . . on the same question of law."

10. 363 So. 2d at 335.

11. *Id.* Justice Adkins dissented with an opinion. *Id.* at 335-37. The bulk of Justice Adkins' dissent consists of a long quotation from Gordon v. State, 104 So. 2d 524, 540-41 (Fla. 1958).

12. Ch. 2908, 1892 Fla. Laws 879 (repealed 1970).

13. Ch. 4400, 1895 Fla. Laws 162 (repealed 1970) provided, *inter alia*, that "no accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the court or jury to comment on the failure of the accused to testify

cases to construe the 1895 amendment was *Gray v. State.*[14]

In *Gray,* the prosecuting attorney stated to the jury that the evidence before it was unexplained and uncontradicted, thereby indirectly calling the jury's attention to the defendant's silence. The defense counsel failed to make an objection to the prosecutor's statement.[15] Despite this failure, the Florida Supreme Court considered the issue on appeal and ruled that the prosecutor's remark was not an improper reference to the fact that the accused had not testified in his own behalf. Instead, the prosecutor's remark was deemed to have been an acceptable comment on evidence properly before the jury.[16] Consequently, the court found it unnecessary to determine whether in the future a timely trial objection would be required to preserve similar issues for appellate review.[17] This question was answered in *Rowe v. State.*[18]

Rowe signaled the beginning of a period of relative stability in Florida's judicial interpretation of the prohibition against prosecutorial comment on the silence of the accused. There, the prosecutor on several occasions alluded to the failure of the defendants to testify in their own behalf.[19] Upon the first objection by defense counsel, the court instructed the jury to disregard the prosecutor's remark.[20] The court ignored defense counsel's second objection.[21]

The Florida Supreme Court ruled that the injury resulting from improper prosecutorial comment upon the failure of the accused to testify could not be cured by countervailing jury instructions.[22] But more importantly, the supreme court held that an improper prosecutorial comment on the defendant's silence was a fundamental error which could be raised for the first time on appeal, despite the lack of an objection or an exception at trial.[23]

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in his own behalf." This language is now embodied in FLA. R. CRIM. P. 3.250.

Seventy years after Florida enacted its "no-comment" prohibition, the United States Supreme Court, in Griffin v. California, 380 U.S. 609, 615 (1965), ruled that the self-incrimination clause of the fifth amendment, "in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."

14. 28 So. 53 (Fla. 1900).

15. *Id.*

16. *Id.* at 54. The court, on the same set of facts, reiterated this position in Clinton v. State, 47 So. 389 (Fla. 1908). *See also* Davis v. State,105 So. 843 (Fla. 1925); State v. Jones, 204 So. 2d 515, 516-17 (Fla. 1967).

17. 28 So. at 54.

18. 98 So. 613 (Fla. 1924).

19. *Id.* at 615, 617-18.

20. *Id.* at 615.

21. *Id.* at 617.

22. *Id.* At the time *Rowe* was decided, Florida's ruling represented the minority view. *See* Annot., 84 A.L.R. 784, 795, 799 (1933).

23. 98 So. at 618. Although defense counsel objected to the prosecutor's comments, he

The scope of *Rowe*'s holding was expanded in *Simmons v. State*.[24] In *Simmons*, the defendant testified in his own behalf. Upon cross-examination, the prosecutor questioned the defendant regarding his failure to testify at preliminary proceedings. Subsequently, the prosecutor directed the jury's attention to the defendant's failure to testify at pretrial hearings. No objection was made by defense counsel.[25]

The court in *Simmons* broadened the bounds of fundamental error by ruling that if the accused testified in his own behalf at one phase of the case, the prosecutor was prohibited from commenting upon the defendant's failure to testify at other phases of the case—including preliminary or pretrial phases.[26] The enforcement of this prohibition was not contingent upon an objection at trial.[27]

Almost twenty years after *Simmons* was decided, the Florida Supreme Court in *Gordon v. State*[28] reaffirmed its traditional pos-

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apparently failed to state an exception to the judge's ruling. Exceptions were generally prerequisites for Florida appellate review of criminal convictions until 1939. *See* ch. 19554, § 290 (3), 1939 Fla. Laws 1389 (repealed 1970).

24. 190 So. 756 (Fla. 1939).

25. *Id.* at 757.

26. *Id.* Earlier in its opinion, the court stated that the law prohibited "comment on the failure of the accused to testify at a preliminary hearing, an application for bail, a habeus corpus hearing or a former trial, as well as his failure to testify in the present trial." *Id.*

27. *Id.* It should be pointed out that *Simmons* was overruled in part in State v. Hines, 195 So. 2d 550 (Fla. 1967). *Hines* expressly repudiated *Simmons* to the extent that it was no longer "reversible error for the prosecution to comment on the failure of the accused to testify in an earlier proceeding [when the accused] voluntarily testified on his own behalf in the trial." 195 So. 2d at 551. In reaching this decision, the *Hines* court placed heavy emphasis on Odom v. State, 109 So. 2d 163 (Fla. 1959).

The court in *Odom* ruled that when the defendant voluntarily chooses to become a witness for himself, the prosecutor may call the jury's attention to what the defendant does and *does not* say. *Id.* at 165. In reaching this conclusion, the *Odom* court focused on two conflicting Florida Supreme Court opinions.

In Sykes v. State, 82 So. 778 (Fla. 1919), the supreme court held that when a defendant testified regarding one aspect of the case, it was reversible error for the prosecutor to comment on the defendant's failure to testify regarding other aspects of the case. *Id.* at 781. Despite the holding in *Sykes*, the supreme court in Dabney v. State, 161 So. 380 (Fla. 1935), reached an opposite conclusion on virtually the same set of facts. The *Dabney* court made no mention of the direct conflict between its opinion and the opinion in *Sykes*. This dichotomy was finally recognized in *Odom*. *Odom* responded by adhering to *Dabney* and overruling *Sykes*. 109 So. 2d at 166. However, the *Odom* court made no mention of *Simmons*, which was very similar to *Sykes*. (Interestingly, *Simmons* made no mention of either *Sykes* or *Dabney*).

Against this background, *Hines* was decided. *Hines* explicitly overruled *Simmons* to the extent that *Odom* had implicitly done so. 195 So. 2d at 551. In turn, *Hines* was overruled sub silientio in State v. Galasso, 217 So. 2d 326 (Fla. 1968). In *Galasso*, the supreme court noted that evidence of defendant's pretrial silence was inadmissible, even if the defendant testified at trial in his own behalf. *Id.* at 330. *Hines* was expressly overruled in Willinsky v. State, 360 So. 2d 760 (Fla. 1978), to the extent that *Willinsky*, in dictum, restored *Simmons* in its entirety.

28. 104 So. 2d 524 (Fla. 1958). One year prior to *Gordon*, in Trafficante v. State, 92 So. 2d 811, 814 (Fla. 1957), the court had stated that:

ture towards improper prosecutorial comments on the defendant's assertion of the right to remain silent. The prosecutor in *Gordon,* while delivering his closing argument to the jury, referred to the failure of two defendants to testify in their own behalf. Defense counsel made no objection to the prosecutor's comment.[29] The supreme court emphasized that the prosecutor's remark constituted fundamental error which could be considered on appeal notwithstanding the lack of an objection at trial.[30]

In 1967, the parameters of fundamental error were enlarged to encompass the impact of *Miranda v. Arizona.*[31] In *Jones v. State,*[32] a police officer testified that the defendant had remained silent when accused of a crime. Defense counsel did not object to the officer's testimony.[33] The Third District Court of Appeal, relying upon *Miranda,* ruled that the introduction of the officer's testimony was a fundamental error which was not waived by the failure to object.[34]

In the same year that *Jones v. State* was decided, the Florida Supreme Court retreated from its traditional stance towards improper comments on a defendant's exercise of the right to remain silent. In *State v. Jones,*[35] the prosecutor allegedly made an improper comment to the jury regarding the defendant's failure to

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> [O]ur law prohibits any comment to be made, directly or indirectly, upon the failure of the defendant to testify. This is true without regard to the character of the comment, or the motive or intent with which it is made, if such comment is subject to an interpretation which would bring it within the statutory prohibition and regardless of its susceptibility to a different construction.

29. 104 So. 2d at 539.

30. *Id.* at 540. In making its decision, the court relied on *Rowe* and *Simmons.* The *Gordon* court also noted its displeasure with the entire "no-comment" prohibition:

> Here again we have a specific legislative prescription of a right to be accorded to those under prosecution for crime. Whether we as judges deem the rule to be wise and salutary is of no consequence at all and we assume no responsibility for it. The Legislature made the rule and we must follow it, at least until the Legislature changes it.

Id.

31. 384 U.S. 436 (1966).

32. 200 So. 2d 574 (Fla. 3d Dist. Ct. App. 1967). With respect to appellate interpretations of improper comments on a defendant's silence, see Singleton v. State, 183 So. 2d 245, 251-52 (Fla. 2d Dist. Ct. App. 1966), for a concise recitation of Florida District Courts of Appeal's decisions issued prior to Jones v. State.

33. 200 So. 2d at 575-76.

34. *Id.* at 576-77. The *Jones* court also ruled that the defendant did not waive the error by testifying in his own behalf. Quoting from *Miranda,* 384 U.S. at 468 n.37, the court stated that " 'it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. *The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.*' [Emphasis supplied.]" 200 So. 2d at 576.

35. 204 So. 2d 515 (Fla. 1967).

testify in his own behalf.[36] No objection was made by defense counsel.[37] In reviewing the defendant's conviction, the Florida Supreme Court disavowed *Gordon* by ruling that improper prosecutorial comment on a defendant's silence did not constitute fundamental error.[38] The court referred to *Gideon v. Wainwright*, which mandated that in criminal prosecutions, all defendants who were unable to afford counsel must, upon request, be furnished counsel by the state without charge.[39] The Florida Supreme Court observed that because the rights of criminal defendants would now be protected by lawyers, the application of the doctrine of fundamental error to the "no-comment" prohibition was "no longer necessary to protect those charged with crime who may be ignorant of their rights."[40] Accordingly, the court held that it would review the challenged arguments of prosecutors only if a timely trial objection was made.[41]

Although the decision in *State v. Jones* was a departure from previous supreme court rulings, judicial balance was restored in *Bennett v. State*.[42] In *Bennett*, the state's witness testified that the defendant had refused to waive his *Miranda* rights after his arrest. Defense counsel moved for a mistrial, and the trial court denied the motion.[43] The Florida Supreme Court concluded that the denial of the defendant's motion for a mistrial was reversible error.[44] In reaching this conclusion, the *Bennett* court pointed to *Jones v. State* as establishing that an improper comment on a defendant's silence was an error of "constitutional dimension" which could not be considered harmless.[45]

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36. *Id.* at 516. The word "allegedly" is used because the court found that the prosecutor's remarks were legitimate comments directed at the evidence before the jury, rather than at the defendant's silence. *Id.* at 517. This finding was made after "distinguishing" the holding in Trafficante v. State, 92 So. 2d 811, 814 (Fla. 1957), which admonished that *any* comment on a defendant's silence was prohibited.

37. 204 So. 2d at 516.

38. *Id.* at 519. By implication, the supreme court in *Jones* also receded from *Rowe* and *Simmons*.

39. 372 U.S. 335, 342-45 (1963).

40. 204 So. 2d at 519.

41. *Id.* The court's contemporaneous objection requirement was cited with approval as recently as 1976, in Thomas v. State, 326 So. 2d 413 (Fla. 1976).

While the supreme court in State v. Jones did not mention the earlier decision of the Third District Court of Appeal in Jones v. State, the Second District Court of Appeal in *Clark* noted the discrepancy between the two *Jones* cases. 336 So. 2d at 470-73.

42. 316 So. 2d 41 (Fla. 1975).

43. *Id.*

44. *Id.* at 43-44.

45. *Id.* at 42-44. The central role played by Jones v. State in contributing to the *Bennett* decision was noted by Justice England in his concurring opinion. *Bennett*, 316 So. 2d at 44. *See also Bostic*, 332 So. 2d at 350. Justice England also pointed out that in State v. Galasso, 217 So. 2d 326 (Fla. 1968), the court held that an improper comment regarding the defend-

Bennett strongly intimated that improper comments on a defendant's silence would serve as the basis for fundamental error.[46] *Bennett*'s intimation was made explicit in *Willinsky v. State*.[47] *Willinsky* involved a defendant who testified at his trial. The prosecutor questioned the defendant regarding his silence at a preliminary hearing. Defense counsel objected to this line of questioning, but the objection was overruled.[48] The Florida Supreme Court ruled that the disclosure of the defendant's silence at pretrial proceedings was error which could not be harmless.[49]

Of particular interest in *Willinsky* is the manner in which the decision was reached. The court first noted the rule of *Simmons v. State*, which stated that "it was reversible *fundamental* error for the prosecution to comment on [the] failure of the accused to testify in an earlier proceeding."[50] The court then discussed *United States v. Hale*[51] and *Doyle v. Ohio*,[52] observing that both had essentially stated "that impeachment by disclosure of the exercise of the right to silence is a denial of due process."[53] Consequently, the supreme court reinstated the rule of *Simmons*.[54] Thus, the court, in dictum, deemed that a violation of the "no-comment" prohibition was fundamental error.[55]

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ant's silence was harmless error. As Justice England observed, *Galasso*'s holding was overruled by *Bennett*. 316 So. 2d at 44.

Neither *Galasso* nor *Bennett* cited Way v. State, 67 So. 2d 321 (Fla. 1953), in which the court held that a violation of the "no-comment" prohibition could never be harmless error. *Id.* at 323. In Shannon v. State, 335 So. 2d 5 (Fla. 1976), the Florida Supreme Court, without reference to *Way*, explicitly ruled that *Bennett* precluded the application of the harmless error doctrine to an improper comment on a defendant's silence.

46. *See* 316 So. 2d at 42-43. The foundation for this intimation lies in the manner in which *Bennett* was decided. The court, in holding that improper comments on a defendant's silence were constitutionally erroneous, placed heavy emphasis on the "fundamental error" language in Jones v. State. *See also Bostic*, 332 So. 2d at 350, in which the Fourth District Court of Appeal found that *Bennett*'s emphasis on *Jones* was essentially an express approval of the application of the doctrine of fundamental error to the "no-comment" prohibition.

47. 360 So. 2d 760 (Fla. 1978).

48. *Id.*

49. *Id.* at 763.

50. *Id.* at 762 (emphasis added).

51. 422 U.S. 171 (1975). The Court in *Hale*, noting that pretrial silence is so ambiguous as to be of little probative value, declared that "it was prejudicial error for the trial court to permit cross-examination of [the defendant] concerning his silence during police interrogation." *Id.* at 176, 180-81.

52. 426 U.S. 610 (1976). The *Doyle* Court held that a defendant's *Miranda*-protected silence at the time of his arrest could not be used to impeach his exculpatory testimony at trial. *Doyle* made the *Hale* prohibition applicable to the states via the due process clause of the fourteenth amendment. *Id.* at 619.

53. 360 So. 2d at 762.

54. *Id.* at 763.

55. Since the defense counsel had objected at trial, the issue properly presented by the facts concerned the existence of reversible, not fundamental error. Because *Willinsky*'s rein-

Approximately four months after *Willinsky* was decided, the Florida Supreme Court issued its opinion in *Clark*. The supreme court in *Clark* first concluded that an improper comment on a defendant's exercise of the right to remain silent was error, but not fundamental error. Accordingly, a contemporaneous objection would be necessary to preserve such an error for appellate review. The court then offered justifications for the contemporaneous objection rule. Finally, the court held that in addition to a contemporaneous objection, a motion for mistrial would also be a prerequisite for appellate review of improper comments on a defendant's silence.

The court in *Clark* prefaced its decision by noting that the admission of evidence regarding a defendant's postarrest silence was improper. Consequently, the admission of such evidence constituted reversible error, provided that an objection was made at trial.[56]

The court next considered the effect of a defendant's failure to object at trial to improper comments upon his silence. The court first stated that this issue had not been addressed in *Bennett v. State, Shannon v. State,*[57] and *Willinsky v. State,* because in those decisions, timely objections to improper comments had been made.[58] The *Clark* opinion ignored the intimation in *Bennett* and the dictum in *Willinsky* which essentially proposed that an improper comment on a defendant's silence was an error of fundamental dimensions.[59] Instead, the supreme court pointed out that "even constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court."[60] The court then announced that "[a]n improper comment on [a] defendant's . . . right to remain silent is constitutional error, but not fundamental error."[61] In analogous support of this announcement, the court cited *Chapman v. California*[62] and *Doyle v. Ohio.*[63]

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statement of the doctrine of fundamental error was not essential to the decision of the court, this portion of the court's opinion is dictum and is without force as precedent. *See, e.g.*, State *ex rel.* Biscayne Kennel Club v. Board of Bus. Reg., 276 So. 2d 823, 826 (Fla. 1973). *See also* Dade County v. Brigham, 47 So. 2d 602, 603 (Fla. 1950).

56. 363 So. 2d at 333.

57. 335 So. 2d 5 (Fla. 1976).

58. 363 So. 2d at 333.

59. Justice Adkins, in his dissent, wrote that the "life expectancy of our decisions has been seriously reduced, as the opinion of the majority recedes from principles enunciated in *Bennett* . . . and *Willinsky*." 363 So. 2d at 335. Justice Adkins authored both *Bennett* and *Willinsky*.

60. *Id.* at 333 (citing Sanford v. Rubin, 237 So. 2d 134, 137 (Fla. 1970)). In *Sanford*, an allegation of unconstitutionality regarding a legislative act was barred because of a failure to raise an objection at the proper time.

61. 363 So. 2d at 333.

62. 386 U.S. 18 (1967).

63. 426 U.S. 610 (1976).

The court in *Clark* emphasized that the United States Supreme Court in *Chapman* had refused to hold that the constitutional error of prosecutorial comment on a defendant's silence must always be deemed harmful.[64] According to the *Clark* decision, *Doyle* implicitly reaffirmed *Chapman* in that the United States Supreme Court noted that the state had failed to argue that the use of the defendant's silence for impeachment purposes was harmless error.[65]

The supreme court in *Clark* proposed that the significance of *Chapman* and *Doyle* is that they "do not mandate the adoption of an absolute rule requiring reversal in every case where there has been an improper comment on the defendant's right to remain silent."[66] This statement is true. There is a problem, however, in that the court is implicitly offering the statement in the following manner: if an improper comment on the defendant's right to remain silent is not necessarily harmful error, then such a comment cannot be fundamental error. This implied judicial construction is unjustified.

Chapman stated that "there may be some constitutional errors which *in the setting of a particular case* are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless."[67] As the Court noted, the determination of whether a constitutional error is harmless must be made within the context of a particular case. The *Clark* opinion, however, failed to recognize that simply because a constitutional error may be harmless within the context of one case does not preclude the possibility that such an error may be fundamental within the setting of another case. In that event, an appellate court should be allowed to review the error despite the lack of an objection at trial. However, as a result of *Clark*, this avenue of appellate review has been foreclosed.

The Florida Supreme Court articulated a strong judicial response to the assumption that an improper comment upon a defendant's exercise of the right to remain silent is automatically fundamental error.[68] A more prudent response to the assumption of fundamental

64. 363 So. 2d at 333.

65. *Id.* at 334. *Chapman* held that before a federal constitutional error can be deemed harmless, a court must find the error to be harmless beyond a reasonable doubt. 386 U.S. at 24 (citing Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)). In comparison, Florida's "harmless error" statute precludes the reversal or remand of an action unless the alleged error resulted in a miscarriage of justice. FLA. STAT. § 59.041 (1977).

66. 363 So. 2d at 334.

67. 386 U.S. at 22 (emphasis added).

68. The Fourth District Court of Appeal in its opinion in *Bostic* essentially concluded that a violation of the "no-comment" prohibition was fundamental error per se. But this conclusion was reached on the strength of the supreme court's decision in *Bennett*. 332 So. 2d at 350.

error was demonstrated by the Second District Court of Appeal in *Clark*. That court more reasonably concluded that

> [s]ome references may be so prejudicial to the right of a defendant to a fair trial that the error must be deemed to fall within the ambit of that elusive term "fundamental." As in many other areas of the law, the decision should be made on a case by case basis. The polestar must always be whether the defendant has been afforded a fair trial.[69]

The Second District Court of Appeal correctly advocated an initially neutral appellate perspective regarding improper comments on a defendant's silence. This perspective considers the improper comments within the context of a particular case and does not mandate that an improper reference to a defendant's silence is automatically fundamental or nonfundamental error, regardless of the circumstances.

In *Clark*, the supreme court unjustifiably ruled that an improper comment upon a defendant's exercise of the right to remain silent cannot be fundamental error. However, under Florida law, neither can such an improper comment be harmless error.[70] The *Clark* decision reached the only remaining alternative: an improper comment on a defendant's silence represents reversible error[71] which can be

69. 336 So. 2d at 473. After stating these propositions, the court in *Clark* put them into practice by reviewing the allegation of fundamental error. Thus, the question in *Clark* was whether fundamental error actually occurred. After reviewing the record, the court concluded that the error was essentially harmless. *Id.*

70. *See Bennett*, 316 So. 2d at 43-44; Shannon v. State, 335 So. 2d 5 (Fla. 1976). Curiously, Florida law in this regard is stricter than its federal counterpart. Under federal law, a violation of the "no-comment" prohibition can be harmless error. However, the *Clark* decision did provide that in a nonjury trial, an improper comment on a defendant's silence can be deemed harmless error. Furthermore, the *Clark* opinion mandated that improper comments made or elicited by defense counsel would not constitute error. 363 So. 2d at 334-35.

71. Specifically, the court in *Clark* ruled that:

> 1. Reversible error occurs in a jury trial when a prosecutor improperly comments upon or elicits an improper comment from a witness concerning the defendant's exercise of his right to remain silent. Likewise, reversible error occurs when any state, defense or court witness in a jury trial spontaneously volunteers testimony concerning the defendant's exercise of his right to remain silent.
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> 2. In a non-jury trial, an improper comment concerning the defendant's exercise of his right to remain silent is not necessarily reversible error, and it may be disregarded by the trial court; however, it may serve as grounds for appropriate sanctions against the offending prosecutor or witness.
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> 3. No error occurs when defense counsel comments upon or elicits testimony concerning the defendant's exercise of his right to remain silent. The same is true if defense counsel were to improperly suggest to a friendly witness that he "spontaneously" comment on the defendant's exercise of his right to remain silent so as to give him a mistrial. A defendant may not make or invite an improper

waived unless a contemporaneous objection is made. Unfortunately, the court's justifications for this procedural requirement are insufficient.

The court generally observed that it had "long recognized the contemporaneous objection rule,"[72] and relied upon *State v. Jones* and *Wainwright v. Sykes*[73] as postulating two justifications for such a rule.

In *Sykes*, the United States Supreme Court ruled that the defendant's noncompliance with the state's contemporaneous objection rule barred a constitutional review of his conviction via federal habeas corpus.[74] This procedural bar could be bypassed only if there was a showing of both "cause" for the noncompliance with the rule and "prejudice" resulting from the noncompliance.[75] This restriction of federal habeas corpus was viewed by the Court as promoting four goals, one of which was directly related to the contemporaneous objection rule.[76]

The Supreme Court in *Sykes* emphasized that contemporaneous objection rules have a positive effect on the administration of justice.[77] The Florida Supreme Court reached the same conclusion in *Clark* and quoted the following language from *Sykes*:

> A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding. It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary to properly deciding the federal constitutional question.[78]

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comment and later seek reversal based on that comment.
363 So. 2d at 334-35.

72. *Id.* at 334.

73. 433 U.S. 72 (1977). For an insightful analysis of *Sykes*, see 16 DUQ. L. REV. 403 (1978).

74. 433 U.S. at 86. The defendant had failed to raise a timely objection to the admissibility of his allegedly involuntary confession. *Id.*

75. *Id.* In reaching this result, the Court adopted the "cause and prejudice" standard from Davis v. United States, 411 U.S. 233, 244 (1973), and rejected the older standard of Fay v. Noia, 372 U.S. 391 (1963). The *Fay* standard denied federal habeas corpus relief only when the defendant had "deliberately bypassed" a state procedural requirement and thus forfeited his state court remedies. *Id.* at 438-39. The Court in *Fay* defined a "deliberate bypass" in the terms of the classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464 (1937): " 'an intentional relinquishment or abandonment of a known right or privilege.' " 372 U.S. at 438-39.

76. The other three objectives were: 1) encouraging greater federal respect for state procedural rules; 2) fostering the perception of a state criminal trial "as a decisive and portentous event"; and 3) preventing "sandbagging" by defense attorneys in state courts—*i.e.*, preventing the practice of failing to raise a constitutional claim in a state criminal proceeding, with the intention of raising that claim in a later federal habeas corpus petition in the event of a conviction. 433 U.S. at 88-90.

77. *Id.* at 88.

78. 363 So. 2d at 334 (quoting 433 U.S. at 88).

The implication of this language is twofold. First, a state appellate court is just as removed from the nuances of a state criminal trial as is a federal district court. Second, in the absence of an objection and a ruling upon that objection by the trial court, the record on appeal may be insufficient for an appellate determination of the existence and extent of an alleged error. In other words, because the defendant is to blame for not preserving the point for an appeal, the defendant should bear the consequences of an insufficient record on appeal.

Clark did not consider that, despite the lack of an objection at trial, the probability is that in the majority of cases the record on appeal would still adequately disclose the nature and extent of any comments on a defendant's silence. Rather than addressing this issue, the court in *Clark* focused its attention on potential abuses of the doctrine of fundamental error.

The *Clark* decision evidenced a sense of judicial apprehension concerning questionable defense counsel tactics on behalf of the "undeserving." This sense of apprehension was originally articulated in *State v. Jones,* a case from which the court in *Clark* derived some measure of comfort. *State v. Jones* was the first, and until *Clark* the only, Florida Supreme Court case to hold that a timely objection *must* be made to an improper comment on the silence of the accused to preserve the point on appeal.[79]

The *Clark* opinion quoted the following language from *State v. Jones* as providing a rationale for the timely objection rule:

> At the present time all defendants in criminal trials who are unable to engage counsel are furnished counsel without charge . . . . Their rights are now well guarded by defending counsel. Under these circumstances further application of the [doctrine of fundamental error to the "no-comment" prohibition] will contribute nothing to the administration of justice, but rather will tend to provoke censure of the judicial process as permitting "the use of loopholes, technicalities and delays in the law which frequently benefit rogues at the expense of decent members of society."[80]

State v. Jones offered an example of how the doctrine of fundamental error can subvert the integrity of the judicial process.[81] Consider the following vignette: During the course of a trial, an im-

79. 204 So. 2d at 519. In Thomas v. State, 249 So. 2d 510, 512-13 (Fla. 3d Dist. Ct. App. 1971), the court found that the failure to properly object to an allegedly improper comment on the defendant's silence precluded valid appellate review. This finding was made without reference to State v. Jones.

80. 363 So. 2d at 334 (quoting 204 So. 2d at 519).

81. 204 So. 2d at 518.

proper comment is made in reference to the defendant's assertion of the right to remain silent. The defense counsel chooses to forego an objection and gambles for an acquittal. But the defense attorney knows that if his gamble fails, the conviction will automatically be reversed on appeal as being tainted by an error of fundamental dimensions.[82]

This scenario assumes that an improper comment on a defendant's silence is automatically fundamental error. The *Clark* decision responded to this assumption by ruling that a violation of the "no-comment" prohibition cannot be fundamental error. Thus, any unfair advantage afforded to criminal defendants is negated by requiring an objection at trial to preserve any chance of reversal on appeal. However, the unfair advantage obtained by the failure to object could also be negated by ruling that appellate courts should use an ad hoc approach in determining whether an improper comment on a defendant's silence constitutes fundamental error.[83]

An ad hoc approach allows an appellate court to recognize that within the context of a particular case, a violation of the "no-comment" prohibition could very well fall below the standard of harm necessary for a finding of fundamental error. Accordingly, the failure to object would not afford the defendant an automatic reversal on appeal.[84] Furthermore, an ad hoc approach provides for corrective appellate action in the minority of cases in which fundamental error has occurred. This possibility of appellate review is especially important in light of the actual reason for most failures to object to a violation of the "no-comment" prohibition.

In assuming that a defense counsel's failure to object at trial is a deliberate and intelligent decision, the court in *Clark* indulged in what Justice Brennan has called "the comfortable fiction that all lawyers are skilled or even competent craftsmen in representing the fundamental rights of their clients."[85] The *Clark* decision ignored "the reality that the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel."[86] The practical and regrettable result of *Clark* is that appellate

82. An abbreviated version of this vignette appeared at the conclusion of *Clark*. 363 So. 2d at 335. Although *Clark*'s version of this vignette considered the effect of the failure to move for a mistrial, rather than the effect of the failure to object, the consequences remain the same.

83. 336 So. 2d at 473.

84. In *Clark*, the Second District Court of Appeal, utilizing a case by case approach, found that an improper comment on the defendant's silence was not fundamental error. *Id.* at 473. Thus, no advantage was gained by failing to object at trial.

85. *Sykes*, 433 U.S. at 118 (Brennan, J., dissenting).

86. *Id. See also* Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 997 (1965); Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 16-19 (1970).

protection of an individual's recognized substantive right is now contingent upon the varying skills and abilities of defense counsel.[87]

In addition to the contemporaneous objection requirement, the *Clark* decision rather unexpectedly mandated that a motion for mistrial would also be a prerequisite for appellate review of an improper comment on a defendant's silence.[88] Thus, "[i]f the defendant fails to object or if, after having objected, he does not ask for a mistrial, his silence will be considered an implied waiver."[89] In support of the motion for mistrial requirement, the supreme court merely observed that when an improper comment on the defendant's silence does occur, "[t]he important consideration is that

87. Justice Adkins in his dissenting opinion noted that: "Technicalities in the law should be avoided, not fostered. Our fundamental responsibility is to protect the constitutional rights of individuals, so that justice is rendered without regard to the ability of attorneys to recognize reversible error when it springs forth in the heat of a trial." 363 So. 2d at 335.

88. *Clark*'s motion for mistrial requirement was unexpected because the court did not even discuss motions for mistrial before issuing its formal findings of law at the *conclusion* of the opinion. Justice Adkins, in his dissent, noted that

> [t]he procedure to be followed during trial as explained by the majority, has not been briefed by the attorneys and is not necessary for the determination of this case. Perhaps we can lessen the impact of the opinion by considering such procedural suggestions as dicta and reconsider these principles in various cases which will surely arise under the principles enunciated by the majority.

Id. at 335-36. However, the vitality of the motion for mistrial requirement should not be doubted.

In Roundtree v. State, 362 So. 2d 1347 (Fla. 1978), an improper comment on the defendant's silence was made by a witness in response to prosecutorial questioning. The defense counsel objected to both the prosecutor's question and the witness's improper comment, and requested that the comment be stricken from the record. The trial judge sustained the objection, and instructed the jury to disregard the comment. No motion for mistrial was made. The defendant was subsequently convicted for possession of heroin. The Florida Supreme Court exercised its jurisdiction to review the defendant's conviction before it had decided *Clark*. *Id.*

The supreme court in *Roundtree*, relying on its recent decision in *Clark*, stated that:

> Roundtree objected and asked that the improper comment be stricken from the record. The trial court sustained the objection and granted his request. At the time the error occurred, Roundtree would have been entitled to a mistrial if he had asked for it. Alternatively, he had the right to have the trial proceed. The trial court gave Roundtree exactly what he requested, and he is not now in a position to complain. If he wanted a mistrial when the error occurred, he should have asked for it. By allowing the trial to proceed, he waived his right to raise this issue on appeal.

Id. at 1348. *See also* Houston v. State, 364 So. 2d 877 (Fla. 3d Dist. Ct. App. 1978).

89. 363 So. 2d at 335. In analogous support of this rule, the court cited Spenkelink v. State, 350 So. 2d 85 (Fla.), *cert. denied*, 428 U.S. 911 (1977). In *Spenkelink*, the defendant failed to timely raise his objection "that certain jurors were improperly excluded from the jury panel from which the jury was selected." 350 So. 2d at 85. The Florida Supreme Court ruled, in pertinent part, that the defendant's failure to timely raise his objection barred appellate review of this assignment of error, citing Wainwright v. Sykes, 433 U.S. 72 (1977). Thus, *Spenkelink* represents an appellate endorsement of a timely objection rule. Accordingly, *Spenkelink*'s relevance to the *Clark* decision is limited to *Clark*'s contemporaneous objection rule.

the defendant retain primary control over the course to be followed in the event of such error."[90] As authority for this observation, the court cited *United States v. Dinitz*[91] without further elaboration.

In *Dinitz,* the trial judge, after expelling a defense attorney from the courtroom, offered three alternatives to the defendant.[92] One of those alternatives was the declaration of a mistrial.[93] The defense promptly moved for a mistrial, and the motion was granted.[94] On review, the United States Supreme Court first observed that under the double jeopardy clause of the fifth amendment,[95] the constitutional validity of a reprosecution "after a mistrial has been declared without the *defendant's* request or consent depends on whether 'there is a manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated.' "[96] In contrast, the Court noted that a defendant's motion for mistrial will ordinarily remove " 'any barrier to reprosecution, even if the defendant's motion [was] necessitated by prosecutorial or judicial error.' "[97]

The Supreme Court in *Dinitz* determined that when a defendant requests a mistrial in response to judicially instigated alternatives, the limited nature of those alternatives will not bar reprosecution unless there is a finding of judicial bad faith.[98] In analogous support of this ruling, the *Dinitz* opinion pointed out that a defendant, acting without judicial prompting, will generally face limited alternatives in considering whether to ask for a mistrial: The defendant must choose "between giving up his first jury [or] continuing a trial tainted by prejudicial judicial or prosecutorial error. The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error."[99]

As the Court in *Dinitz* stated, a sua sponte declaration of a mistrial must be "manifestly necessary" before a retrial can be pursued without violating the double jeopardy clause. In light of this rule, *Clark*'s motion for mistrial requirement can be interpreted as

90. 363 So. 2d at 335.

91. 424 U.S. 600 (1976).

92. *Id.* at 603.

93. *Id.* at 604. The other alternatives were a recess pending application to the court of appeals to review the propriety of expelling the defense attorney or a continuation of the trial with the defendant's co-counsel trying the case. *Id.*

94. *Id.*

95. In pertinent part, the fifth amendment provides that "no . . . person [shall] be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V, cl. 2.

96. 424 U.S. at 606-07 (citations omitted) (emphasis added).

97. *Id.* at 607 (quoting United States v. Jorn, 400 U.S. 470, 485 (1971)).

98. 424 U.S. at 608-09.

99. *Id.* at 609 (footnote omitted).

an attempt to avoid the possibility that a reprosecution would be barred because a court, acting on its own motion, mistakenly declared a mistrial which was not manifestly necessary. The need for a sua sponte declaration of a mistrial was restricted by requiring that the defendant move for a mistrial in order to preserve an improper comment on the defendant's silence for appellate review. If the defendant's motion is granted, the improper comment is rendered moot, and under *Dinitz*, a later plea of double jeopardy would be barred.

If *Clark*'s motion for mistrial requirement does represent a concern with the double jeopardy implications attendant with a sua sponte declaration of a mistrial, the basis of that concern is judicial apprehension regarding the standard of manifest necessity. This standard, however, has been significantly diluted by *Arizona v. Washington.*[100]

In *Washington,* the prosecutor moved for a mistrial predicated upon improper and prejudicial comments made during defense counsel's opening statement.[101] The trial judge granted the prosecutor's motion for mistrial without the consent of the defendant.[102] The principal question before the United States Supreme Court was whether the mistrial ruling was supported by the appropriate degree of "necessity" essential to "avoid a valid plea of double jeopardy."[103]

The Supreme Court in *Washington* noted that "[t]he prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant."[104] But the Court found that a literal interpretation of the standard of manifest necessity would be inappropriate. Instead, the Court observed "that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial [declared without the defendant's request or consent] is appropriate."[105]

In *Washington,* the Court determined that the trial judge had declared a mistrial based on a reasonable finding of "high necessity." The judge's finding of "high necessity" for the mistrial was based on his evaluation that the impartiality of the jury had been affected by the defense counsel's improper and prejudicial argu-

100. 434 U.S. 497 (1978).

101. *Id.* at 498.

102. *Id.* at 501.

103. *Id.* at 498.

104. *Id.* at 505. Whether a mistrial is declared sua sponte or at the prosecutor's request, the same standard of manifest necessity will apply to the mistrial ruling if the defendant did not consent. The important factor is not whether the judge or the prosecutor initiated the mistrial, but whether the mistrial was declared without the defendant's request or consent. *See* State v. McNeil, 362 So. 2d 93, 94-95 (Fla. 1st Dist. Ct. App. 1978).

105. 434 U.S. at 506.

ments.[106] The Supreme Court concluded that reprosecution would not be barred by the double jeopardy clause when a trial judge declares a mistrial based on his assessment of possible juror bias, provided that "the trial judge exercised 'sound discretion' in declaring the mistrial."[107]

As a result of *Washington,* the double jeopardy implications of a sua sponte declaration of a mistrial have been substantially lessened. Therefore, if *Clark*'s motion for mistrial requirement is an attempt to obviate the need for a sua sponte declaration of a mistrial, this attempt is predicated upon a misconstruction of the double jeopardy ramifications of such a mistrial. Under *Washington,* a trial judge, exercising sound discretion, could justifiably declare a mistrial based on a reasonable finding of juror bias resulting from an improper comment on the defendant's silence. This sua sponte mistrial ruling would not prevent a retrial under the double jeopardy clause, even though the ruling was made without the defendant's consent or request. Accordingly, there are no legitimate double jeopardy considerations supporting the imposition of a motion for mistrial requirement as a means of bypassing the now diluted standard of manifest necessity associated with the sua sponte declaration of a mistrial.

Irrespective of *Washington*'s dilution of the standard of manifest necessity, *Clark*'s motion for mistrial requirement would still be subject to the general criticisms previously advanced against *Clark*'s contemporaneous objection rule.[108] By making appellate re-

106. *Id.* at 510. *Washington* cannot be limited to those instances in which mistrials are declared as the result of the prejudicial impact of defense counsel error. The important factor is not the source of jury prejudice, but the fact of jury prejudice. Neither the prosecution nor the defense "has a right to have his case decided by a jury which may be tainted by bias . . . ." *Id.* at 516. *See also* DeLuna v. United States, 308 F.2d 140, 152 (5th Cir. 1962).

In according "the highest degree of respect" to the trial judge's evaluation of possible juror bias, the Court offered the following institutional considerations:

> He has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be.

434 U.S. at 513-14 (quoting Wade v. Hunter, 336 U.S. 684, 687 (1949)).

107. 434 U.S. at 514. The Court found that in the instant case, sound discretion had been exercised:

> [E]vincing a concern for the possible double jeopardy consequences of an erroneous ruling, [the trial judge] gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial. We are therefore persuaded by the record that the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding.

Id. at 515-16.

108. Although *Clark* stated that "the defendant . . . has the obligation to object *and* to

view of an improper comment on a defendant's silence dependent upon a motion for mistrial, the Florida Supreme Court failed to recognize that such an improper comment can be fundamental error. Simultaneously, the supreme court also made appellate protection of an individual's recognized constitutional right contingent upon the varying abilities of defense counsel. Moreover, even if *Clark*'s motion for mistrial requirement was supported by valid double jeopardy considerations, the requirement would still be inappropriate in those cases in which a defense attorney's objection to an improper comment on a defendant's silence was overruled.[109]

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request a mistrial," 363 So. 2d at 335 (emphasis added), it may be possible that moving for a mistrial alone would be sufficient to preserve appellate review of an improper comment on the defendant's silence. Consider the following quotation from *Clark*:

> If the defendant, at the time the improper comment is made, does not move for mistrial, he cannot, after trial, in the event he is convicted, *object for the first time* on appeal. He will not be allowed to await the outcome of the trial with the expectation that, if he is found guilty, his conviction will be automatically reversed.

Id. at 335 (emphasis added).

If the emphasized language above indicates that no objection was made at trial, then the preceding quotation suggests the following inverted interpretation: if the defendant, at the time the improper comment is made, *does* move for a mistrial, he will be allowed to object for the first time when he appeals his conviction. Thus, a motion for mistrial alone, rather than in addition to an objection, would preserve appellate review. *See generally Bennett*, 316 So. 2d at 43-44, in which defense counsel, rather than objecting to an improper comment on the defendant's silence, requested a mistrial. The denial of that request was error.

If the preceding analysis improperly assumes that a motion for mistrial alone would allow appellate review, then the quoted language above arguably refers to the effect of not requesting a mistrial after an objection has been overruled. (If the objection was sustained, and no mistrial was requested, there would be no trial court error to serve as the basis for an automatic reversal. *See* Bell v. State, 360 So. 2d 1324, 1325 (Fla. 1st Dist. Ct. App. 1978); Warren v. State, 221 So. 2d 423, 425 (Fla. 2d Dist. Ct. App. 1969).) If this interpretation is the proper one, it may indicate another reason for *Clark*'s insistence on moving for a mistrial after an objection has been overruled.

Where a defendant's objection to an improper comment on his silence is overruled, the supreme court may be apprehensive regarding the possibility that the defense attorney could seek a reversal of a conviction on the grounds that reversible error had occurred. By requiring a mistrial motion, either in conjunction with or following an objection, the court ostensibly prevented the preceding possibility by forcing the termination of the original trial. However, such a requirement does not accomplish its intended purpose. If the objection was overruled, the motion for mistrial based on the same point would not be granted. The denial of the motion would be grounds for appeal, just as a pre-*Clark* overruling of an objection alone would be grounds for appeal. Furthermore, regardless of whether the motion for mistrial requirement operates independently of the contemporaneous objection rule, the requirement is still subject to the same criticisms advanced against the contemporaneous objection rule.

109. When a trial court sustains an objection to an improper comment on a defendant's silence, defense counsel should request either curative jury instructions (via striking the comment from the record) or a mistrial. *See* Roundtree v. State, 362 So. 2d 1347 (Fla. 1978). *See also* Black v. State, 367 So. 2d 656 (Fla. 3d Dist. Ct. App. 1979). Curative jury instructions may salvage what may have been a propitious trial proceeding, while the motion for mistrial may jeopardize such a proceeding. However, requesting a mistrial would be the only means of preserving the improper comment for appellate review in the event of a conviction.

Requiring the defendant to move for a mistrial for the purpose of barring a later plea of double jeopardy presupposes that the defendant's motion will be granted. But if the defendant's objection to an improper comment was overruled, it is highly improbable that a subsequent motion for mistrial would be granted to cure the same error.[110] In such a situation, double jeopardy considerations are not advanced by requiring the defendant to request a mistrial only to have the request denied. The denial of a mistrial simply precludes reaching the double jeopardy question within the context of a retrial following a mistrial.

Although the court in *Clark* recognized that an improper comment on a defendant's silence "violates the defendant's right against self-incrimination,"[111] the court mandated that an objection and a motion for mistrial be made in order to preserve appellate review. The practical considerations offered by the court to support these procedural requirements are insufficient in light of less drastic means available for maintaining the integrity of the judicial process. Ultimately, the major shortcoming in the *Clark* decision is the overemphasis on the utility of procedural rules to the detriment of a substantive individual right.

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Of course, if the objection and motion for mistrial are made in conjunction, sustaining the objection should result in granting the motion. The failure to do so would be grounds for appeal.

110. *See* Smith v. State, 342 So. 2d 990 (Fla. 3d Dist. Ct. App. 1977). There, the prosecution's witness made several references to the defendant's silence. "Defense counsel in each instance objected to the remarks and made motions for curative instruction and/or mistrial. The objections and the motions were denied." *Id.*

The Florida Supreme Court in *Clark* was fully aware of the preceding probability, as evidenced in the following language:

> When an objection and motion for mistrial are made, the trial court must determine whether there was an improper comment on the defendant's exercise of his right to remain silent. If the court finds that there was not, the objection should be overruled. In that event, the objection is preserved, and if the defendant is convicted, it may be raised as a point on appeal.

363 So. 2d at 335. Clearly, the quotation above assumes that the overruling of the objection would result in a denial of a motion for mistrial.

Of course, if the objection and motion for mistrial were made in conjunction, overruling the objection would still result in a denial of the motion. But this observation is the result of hindsight: the objection could be sustained, in which case the motion should be granted.

111. 363 So. 2d at 333.